

STATE OF MICHIGAN
COURT OF APPEALS

HELEN A. TELTOW,

Plaintiff-Appellant,

v

TIGER DEVELOPMENT, LLC and MCCLURE
OIL COMPANY,

Defendants-Appellees.

UNPUBLISHED

December 28, 2001

No. 223070

St Clair Circuit Court

LC No. 99-000672

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying her motion for summary disposition and granting defendants' motion for summary disposition. We reverse and remand for proceedings consistent with this opinion.

On March 2, 1999, plaintiff filed a complaint alleging breach of an oil and gas lease by defendant McClure Oil Company (McClure). Specifically, plaintiff alleged that this defendant had not produced oil or gas from her property since 1991, and ceased operation of the property on October 6, 1996. Additionally, plaintiff alleged that defendant McClure improperly assigned the lease to defendant Tiger Development, LLC (Tiger) on October 16, 1996, without obtaining plaintiff's consent.

The parties filed cross-motions for summary disposition. Defendants argued that the oil and gas lease was valid, although it did not contain a definitive term of duration. Defendants also argued that plaintiff could not obtain relief because the litigation did not name all necessary parties. Defendants further argued that the requirement that plaintiff consent to any assignment was void as a restraint on alienation. Alternatively, defendant argued that the requirement could not be enforced because it was an unreasonable restraint on alienation. Defendants also argued that the lease could not be forfeited as a result of the violation of the assignment term of the lease. Lastly, defendants argued, without citation to authority, that plaintiff's acceptance of income from the lease was an acknowledgment of the assignment and waiver of objection to it. In support of the motion for summary disposition brought pursuant to MCR 2.116(C)(8) and

(C)(10), defendants submitted the affidavit of David J. Hall, managing partner of defendant Tiger.¹

Plaintiff's motion, brought pursuant to MCR 2.116(C)(8), alleged that the lease must be construed against the drafter, defendant McClure. Additionally, plaintiff alleged that oil and gas leases were to be construed for the benefit of the lessor and against the lessee. Any restraint on alienation in the present case was therefore reasonable. The lease drafted by defendant McClure did not contain an express duration. Thus, the lease term was controlled by assignment and production. Defendant Tiger alleged that it would extend production. Accordingly, the property could be occupied indefinitely if the restraint on alienation was not enforced as written. If the restraint on alienation was deemed unreasonable, it could not be severed from the lease and the entire lease was void. Plaintiff also alleged that defendants breached the notice provision of the lease, and therefore, the lease had expired and plaintiff was entitled to summary disposition.

The trial court granted defendants' motion for summary disposition and denied plaintiff's motion. The trial court concluded in its "findings of law" that case law required a conclusion that an assignment without the seller's consent was an unreasonable restraint on alienation when the seller did not raise allegations of waste, impairment, or loss of security. Likewise, the trial court held that plaintiff had failed to meet this damage requirement. The trial court also held, without citation to authority, that plaintiff had waived any consent to the assignment by receipt of royalties, and it was "bound to construe the Agreement against forfeiture."

Plaintiff argues that the trial court erred in concluding, as a matter of law, that the consent to assignment provision of the lease was an illegal restraint on alienation. We conclude that summary disposition was inappropriate because underlying facts to determine a claim of reasonable restraint on alienation were not provided. A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must identify the issues where there is no genuine issue as to any material fact. MCR 2.116(G)(4). The moving party must make and support the motion with pleadings, depositions, admissions, and other documentary evidence. *Spiek, supra*; MCR 2.116(G)(4), (G)(5). Once the moving party has made and supported the motion, the opposing party may not rest on the mere allegations and denials contained in the pleadings, but must set forth facts showing that there is a disputed issue for trial. *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 364; 480 NW2d

¹ The first affidavit by David Hall stated that it was based on personal knowledge and cited attached documentation, evidencing the initial lease, royalty shares, and the assignment. However, this affidavit also delineated defendant McClure's drilling operations on plaintiff's property. Specifically, the affidavit provided that the "Teltow 3" was drilled on "the property" and produced oil and gas until 1991, when it was "temporarily shut in." Despite this fact, the well had "not been abandoned" and was to be reworked by defendant Tiger. However, there was no foundation to establish that this portion of the affidavit was based on personal knowledge because there was no record indicating that Hall had any connection to defendant McClure. Additionally, there was no attached documentation from a representative of defendant McClure to establish these facts. The moving party must make and support a motion for summary disposition brought pursuant to MCR 2.116(C)(10). MCR 2.116(G)(4). The evidence must be substantively admissible. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

275 (1991); MCR 2.116(G)(4). A disputed fact, or the lack thereof, must be established by admissible evidence. *SSC, supra*. Where the truth of a material factual assertion is contingent upon credibility, a genuine issue arises that must be decided by trial, and the motion for summary disposition cannot be granted. *Id.* at 365. Summary disposition is inappropriate where motive, intention, or other conditions of the mind are material issues. *Pemberton v Dharmani*, 207 Mich App 522, 529 n 1; 525 NW2d 497 (1994). Summary disposition is also suspect where the credibility of a witness or deponent is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994).

The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on issues of law. *American Community Mutual Ins Co v Comm'r of Insurance*, 195 Mich App 351, 362; 491 NW2d 597 (1992). Summary disposition involving mixed questions of law and fact is inappropriate where certain material facts are disputed. Cf. *Haupt v Kerr Mfg Co*, 210 Mich App 126, 132 n 2; 532 NW2d 859 (1995). Mixed questions of law and fact are those decisions that require the application of a legal standard to fact determinations. *Thompson v Keohane*, 516 US 99, 109-111; 116 S Ct 457; 133 L Ed 2d 383 (1995).

The trial court concluded, as a matter of law, that the assignment provision constituted an impermissible restraint on alienation. On the record available, we disagree. “A restraint on alienation of property is defined as an attempt by an otherwise effective conveyance or contract to cause a later conveyance (1) to be void (disabling restraint), (2) to impose a contractual liability upon the conveyance for conveying in breach of the agreement not to convey (promissory restraint), or (3) to terminate all or part of a conveyed property interest (forfeiture restraint).” *LaFond v Rumler*, 226 Mich App 447, 451; 574 NW2d 40 (1997). Whether a restraint on alienation may occur is contingent upon the type of interest at issue and whether the restraint is reasonable. *Sloman v Cutler*, 258 Mich 372, 374-375; 242 NW 735 (1932); *LaFond, supra* at 453. If the lessee’s property interest is absolute, restriction on the right of alienation is void. *Sloman, supra*. However, if the lessor retains an interest in the property, the reversionary interest generally supports imposing a restriction on alienation. *Id.* Michigan has adopted a flexible approach to restraints, and a restraint on alienation will not be enforced unless it is found to be reasonable in a particular case. *Nichols v Ann Arbor Federal Savings & Loan Ass’n*, 73 Mich App 163, 168; 250 NW2d 804 (1977).

A land contract is an executory contract in which the seller retains legal title to the premises, but equitable title passes to the purchasers upon execution of the contract. *Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999). Legal title transfers when the purchaser performs all of the obligations of the contract. *Id.* However, an oil and gas lease transfers an interest in oil and gas, while the lessor retains a reversionary interest in the mineral estate. *Energetics, Ltd v Whitmill*, 442 Mich 38, 47; 497 NW2d 497 (1993). Upon termination of an oil and gas lease, any oil and gas rights revert to the grantor of the lease. *Id.* In the transaction in this case, the interest in land held by plaintiff was not merely the holding of legal title until defendants finished their purchase obligations. Rather, plaintiff held title to the property and merely granted defendants permission to remove oil and gas. Pursuant to *Sloman, supra*, and *Energetics, supra*, the general rule of law supports a restriction on alienation due to the nature of plaintiff’s property interest. Accordingly, the trial court erred in applying the law

of land contracts to this transaction where plaintiff retains title to the property and defendant holds only removal rights pursuant to the lease agreement.

Having concluded that a restraint on alienation is permissible under the facts at issue, the next inquiry is whether any restraint on alienation is reasonable. This issue is not preserved for appellate review because it was not decided by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Where an issue presents a question of law for which all necessary facts have been presented, we may address the issue on appeal. *Id.* However, the record is devoid of any factual detail surrounding the assignment, defendants' omission in failing to obtain consent, and the reasonableness of any objection by plaintiff. Furthermore, the issue of reasonableness generally presents a question of fact. Cf. *Sington v Chrysler Corp*, 245 Mich App 535, 549; 630 NW2d 337 (2001). While defendants acknowledged that plaintiff's consent to the assignment was not requested, there was no explanation proffered for this deficiency.² Additionally, there was no record development regarding the reasonableness of the restraint provision and any rejection of the assignment by plaintiff. Accordingly, we reverse the trial court's order granting summary disposition. The decision was premature,³ and the parties failed to present appropriate evidence to the trial court to resolve the issue of reasonableness on summary disposition.⁴

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Martin M. Doctoroff

² It is unknown if notice was not given to plaintiff in order to avoid her exercise of other portions of the lease. For example, both parties acknowledge, although there is no documentary evidence to support the proposition in the record, that Teltow 3 was placed on plaintiff's property, but it ceased production in 1991. After five years of dormancy, defendant Tiger sought to obtain production. The lease provided if the first well was dry, a second well had to be commenced within twelve months or payments had to continue. From the record, we cannot determine if this condition was complied with or if it could be exercised regarding the drilling of wells beyond the first two.

³ Our decision applies equally to the waiver issue raised by defendants. A statement of position without citation to authority is insufficient to bring an issue before the court. *Mann v Mann*, 190 Mich App 526, 536; 476 NW2d 439 (1991). We will not search for authority to sustain or reject a party's position. *Id.* at 537. It is questionable whether plaintiff can be deprived of her property rights when defendants could be made whole by return of the funds. The parties should thoroughly research and prepare these issues for the trial court.

⁴ This may be achieved by the submission of stipulated facts, documentary evidence filed with a new dispositive motion, or an evidentiary hearing.